

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

PAUL W. LEMING, aka LEADER,

Appellant.

No. 32843-7-II

**ORDER CORRECTING
PART PUBLISHED OPINION**

The part published opinion filed on July 11, 2006, is hereby amended as follows:

The footnote marker showing footnote 5 on page 4 is deleted and all following footnotes are renumbered accordingly.

IT IS SO ORDERED.

DATED this _____ day of _____, 2006.

Hunt, J.

We concur:

Quinn-Brintnall, C.J.

Van Deren, J.

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PART PUBLISHED OPINION

Hunt, J. — Paul W. Leming appeals his convictions for assault in violation of a court order, second degree assault, felony harassment, and the jury’s special verdict finding that these convictions involved domestic violence. He argues that (1) double jeopardy precluded these multiple convictions because both the felony harassment and the assault in violation of a court order were incidental to the second degree assault; (2) the trial court erred in failing to dismiss the felony harassment charge for lack of sufficient evidence; (3) the trial court erred in failing to find that assault in violation of a court order, the second degree assault, and the felony harassment constituted the same criminal conduct for offender score purposes; and (4) he received ineffective assistance of counsel when his attorney failed to object to the court’s offender score calculation.

In his Statement of Additional Grounds for Review,¹ Leming also argues that (1) insufficient evidence supported his conviction for second degree assault; (2) he received ineffective assistance of counsel when his attorney failed to object to a witness’s testimony; and (3) the trial court erred in refusing to admit photographic evidence.

¹ RAP 10.10.

Holding that Leming's felony harassment conviction violates double jeopardy and, as a result, his offender score needs recalculation, we reverse Leming's felony harassment conviction, affirm his convictions for second degree assault and assault in violation of a court order, and remand for resentencing.

FACTS

I. The Criminal Acts

Leming's uncle, Terry Strom, agreed to serve divorce papers and a restraining order on Leming on behalf of Leming's wife, Leah Leming.² Strom and his wife, Beverly, went to Leming's home, where Strom served Leming with the papers. Strom told Leming that the papers included a restraining order.

The Stroms drove to the Shelton Inn, where Leah was working, and told her that they had served Leming. As they got in their car to leave the Inn, Leming pulled into the parking lot next to them. Beverly told Leming that he needed to leave because there was a valid restraining order preventing him from contacting Leah. Leming said he wanted to know what was going on because Leah was supposed to have cancelled the restraining order, saying, "[S]he's just signed her death warrant . . . [S]he shouldn't have been doing this . . . she knew better." Report of Proceedings (RP) at 30. Leming went into the room where Leah was working, and Beverly followed.

Beverly saw Leming push Leah into the bathroom wall and hit her with the folded legal papers, yelling and calling Leah names. Leming said, "I can snap you like a twig." RP at 67.

² We use first names for clarity where necessary. We intend no disrespect.

Beverly told him to stop, stating that someone would call the police. As Leming left the room, Beverly heard him say, “[S]he’s a dead bitch and that baby, too.”³ RP at 32. Apparently, Leah did not hear this threat.

Terry called the police, who arrived shortly thereafter.

II. Procedure

The State charged Leming with assault in violation of a court order (domestic violence), fourth degree assault (domestic violence), second degree assault (domestic violence) predicated on felony harassment, and felony harassment (domestic violence).

At trial, there was some dispute about Beverly’s exact location during Leming’s assault of Leah. The State showed the jury the security video tape footage taken outside the motel room, which Beverly used during direct examination to illustrate her position outside the room. Leming did not object. Beverly also testified that she had been inside the room. Leming testified that she was not.

The following day, the State sought to recall Beverly as a rebuttal witness. Leming objected, arguing that Beverly would change her testimony about her exact location after she reviewed the surveillance tape. The trial court overruled the objection and allowed the State to recall Beverly. During her rebuttal testimony, Beverly stated that, upon closer review of the videotape, she realized that she had not been inside the motel room; rather, she had been standing in the doorway. Beverly testified that, from her vantage point in the doorway, she had a clear view of Leah and Leming inside the room.

³ Leming and Leah have a young child together.

Leming attempted unsuccessfully to offer into evidence a photo Officer Ohlson had taken of Leah, showing some of her injuries.⁴ The court ruled the photo inadmissible until such time as Leming first laid a proper foundation. Thereafter, Leming did not seek to establish a proper foundation or to offer the photo into evidence again.

The jury found Leming guilty of all charges. The trial court dismissed the fourth degree assault conviction, count II, because the State had charged it in the alternative with Count I, assault in violation of a court order.⁵

Leming's offender score was 9+. The trial court sentenced Leming to 47 1/2 months confinement for count I, assault in violation of a court order; 73 1/2 months confinement for count III, second degree assault, predicated on felony harassment; and 29 months confinement for count IV, felony harassment. At sentencing, Leming neither challenged his offender score nor argued that his convictions merged or constituted double jeopardy.

Leming appeals.

ANALYSIS

I. Double Jeopardy

The double jeopardy clauses of the United States and the Washington Constitutions guarantee that no person shall be twice put in jeopardy, i.e., subject to multiple prosecutions or punishments for the same offense. *State v. Baldwin*, 150 Wn.2d 448, 453-54, 78 P.3d 1005 (2003). Leming argues that the trial court twice placed him in double jeopardy (1) when it

⁴ According to Leah, Officer Ohlson took the photograph to show red marks on her shoulder, neck, and jaw. But the photo showed marks on only her jaw. It appears that Leming sought to introduce the photograph to impeach Leah and to show that she did not suffer the injuries she claimed.

convicted him of both assault in violation of a court order and second degree assault, counts I and III, respectively; and (2) when it convicted him of both felony harassment and second degree assault, counts IV and III, respectively. We disagree with Leming's first argument and agree with the second.

A. Standard of Review

We review double jeopardy questions de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

That the Legislature specifically authorizes multiple punishments for a single offense does not necessarily violate the double jeopardy clause. *In re Restraint of Burchfield*, 111 Wn. App. 892, 895, 46 P.3d 840 (2002). Where a criminal act violates more than one criminal statute, the court must determine whether the Legislature intended to punish that act under both statutes. *Baldwin*, 150 Wn.2d at 454. We follow three steps to determine whether the Legislature authorized multiple punishments for a single criminal act. *Burchfield*, 111 Wn. App. at 895.

First, we look to the statutory language to determine whether the Legislature specifically authorized separate punishments. *Burchfield*, 111 Wn. App. at 895. Second, if the statute is silent about whether the Legislature intended separate punishments, we apply the same evidence test to determine whether each legislatively-defined offense has an element not contained in the other. *Burchfield*, 111 Wn. App. at 896; *See also Blockberger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Third, if each offense contains a separate element, we look for evidence of legislative intent to treat the crimes as one offense for double jeopardy purposes. *Burchfield*, 111 Wn. App. at 896.

We may also apply the merger doctrine. Under the merger doctrine, when separately criminalized conduct raises another offense to a higher degree, we presume that the Legislature intended to punish both offenses only once, namely for the more serious crime with the greater sentence. *Freeman*, 153 Wn.2d at 772-73.

B. Second Degree Assault

In RCW 9A.36.021, our Legislature provided several methods by which an assault can be raised to the second degree. Here, the State charged Leming with second degree assault with intent to commit felony harassment. Thus, at issue is only one method of second degree assault, defined as follows:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

....

(e) *With intent to commit a felony*, assaults another

....

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

RCW 9A.36.021(1)(e); (2)(a) (emphasis added).

Felony harassment, the underlying felony raising Leming's assault of Leah to the second degree, is defined, in pertinent part, as follows:

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person . . .

....

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. . . .

....

(b) A person who harasses another is guilty of a class C felony if either of the following applies: . . . (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other

person.

RCW 9A.46.020.

C. Second Degree Assault and Assault in Violation of a Court Order: No Double Jeopardy

The State charged Leming with both second degree assault, Count III, and assault in violation of a court order, Count I. We apply the three-step legislative-intent analysis to these two crimes.

RCW 26.50.110, assault in violation of a court order, provides in pertinent part:

(1) Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2) (a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section.

....

(4) Any assault that is a violation of an order issued under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

1. No express statutory authorization of separate punishments

First, we determine whether the statutes specifically authorize separate punishments for the two crimes—second degree assault and assault in violation of a court order. *Burchfield*, 111 Wn. App. at 896. A separate statute, which we discuss in step three, shows the Legislature’s implicit intent for separate punishments where a defendant has committed both second degree

assault and assault in violation of a court order. Nonetheless, the plain language of the statutes defining these two crimes do not themselves expressly authorize separate punishments.

2. Different elements, not same evidence

Since neither statute, RCW 9A.36.021 or RCW 26.50.110, expressly authorizes separate punishments, we apply the same evidence test. Separate punishments do not constitute double jeopardy where the

two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment . . . *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932):

“The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. . . .”

This test emphasizes the elements of the two crimes. “If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. . . .” *Iannelli v. United States*, 420 U.S. 770, 785 n.17, 95 S. Ct. 1284, 1294, 43 L. Ed. 2d 616 (1975).

Brown v. Ohio, 432 U.S. 161, 166, 87 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). Here, each offense requires proof of an element that the other does not, thus, meeting the *Blockburger* test.

In order to prove assault in violation of a court order, the State had to prove that Leming (1) had knowledge of the order, (2) knowingly violated the order, and (3) assaulted Leah within the meaning of RCW 26.50.110(4), which did not amount to first or second degree assault. In order to prove second degree assault as charged, the State had to prove that Leming assaulted Leah with intent to commit felony harassment. But to prove the felony harassment component of second degree assault under the facts here, the State did not have to prove that Leming knowingly

violated a court order. Rather, it had to prove that Leming harassed Leah by threatening to kill her. RCW 9A.46.020(a)(i) and (2)(b). The same evidence test shows that the Legislature has treated these two crimes separately.

3. Legislative intent to punish two crimes separately

The same evidence test, however, is not always dispositive. *Burchfield*, 111 Wn. App. at 897. We must first confirm that the Legislature intended to punish these two crimes separately.

In promulgating the Domestic Violence Protection Act, Title 26.50 RCW, the Legislature expressly stated that “[a]ny proceeding” under the Act is “in addition to other civil or criminal remedies.” RCW 26.50.210. The statutes criminalizing assault in violation of a court order and second degree assault are located in different chapters of the Revised Code of Washington: Second degree assault is located in Title 9A of the Washington Criminal Code, RCW 9A.36.021(1)(e); assault in violation of a court order is located outside the criminal code in Title 26.50 of the Domestic Violence Protection Act (the Act), RCW 26.50.110. Assault in violation of a no-contact order is a “proceeding” under the Act; thus, punishment for such a violation is “in addition to other . . . criminal remedies,” RCW 26.50.210, namely punishment for second degree assault under RCW 9A.36.021(1)(e).⁶

In addition, the Legislature has further protected domestic violence victims by increasing the punishment for violation of a court order when, like here, that violation is based on an assault.

⁶ The Legislature’s express exclusion of first and second degree assaults from RCW 26.50.110(4) further illustrates its intent to allow separate punishment for such higher degrees of assault in addition to punishment under RCW 26.50.110 for lesser degree assaults committed in violation of a no-contact order.

Such an assault increases the danger to the victim beyond that involved in the act of contacting the victim in violation of the court order. Former RCW 10.99.040(4)(b), .050(2);⁷ *see also State v. Ward*, 148 Wn.2d 803, 810, 64 P.3d 640 (2003). Thus, the Legislature has increased the punishment for assault in violation of court order to a class C felony, which assault, if not coupled with the court-order violation, would be a gross misdemeanor. RCW 26.50.110(4). In this manner, the Legislature has implicitly expressed its intent to punish separately the two crimes at issue here.

As Division One of our court has recently explained in an analogous case,

The constitutional protection against double jeopardy is not offended if the legislature intends cumulative punishments for two or more offenses. At issue here is whether the legislature intended to punish separately both felony violation of a no-contact order and third degree assault, where the former crime is based, in part, on the latter. Because legislative intent clearly indicates that separate punishments for violations of these two criminal statutes were intended, we hold that there is no double jeopardy violation.

State v. Moreno, ___ Wn. App. ___, 132 P.3d 1137, ___ (2006) (footnote omitted). Similarly, we hold here that the Legislature intended to punish separately both assault in violation of a no-contact order and second degree assault.

Accordingly, we hold that these separate charges and punishments do not constitute double jeopardy.

D. Felony Harassment and Second Degree Assault: Double Jeopardy

Leming next argues that he was unlawfully placed in double jeopardy when the jury convicted him of both felony harassment and second degree assault because the felony harassment

⁷ Recodified in Laws of 2000, ch. 119, § 18 as RCW 26.50.110(4).

conviction was incidental to the second degree assault conviction. We agree.

RCW 9A.46.020, which governs felony harassment, provides in pertinent part:

- (1) A person is guilty of harassment if:
 - (a) Without lawful authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or
 -
 - (iii) To subject the person threatened or any other person to physical confinement or restraint; or
 - (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; *and*
 - (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. “Words or conduct” includes, in addition to any other form of communication or conduct, the sending of an electronic communication.
- (2) (a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.
- (b) A person who harasses another is guilty of a class C felony if either of the following applies: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim’s family or household or any person specifically named in a no-contact or no-harassment order; or (ii) the person harasses another person under subsection (1)(a)(i) of this section by *threatening to kill the person* threatened or any other person.

(Emphases added.)

1. No express authorization of separate punishments

The two statutes governing felony harassment and second degree assault, RCW 9A.46.020 and RCW 9A.36.021, respectively, do not contain specific provisions expressly authorizing separate punishments for the same conduct. *See, e.g. Burchfield*, 111 Wn. App. at 896. Thus, we turn to the same evidence test.

2. Same evidence test

The State charged that Leming committed felony harassment by “knowingly and without

lawful authority, did threaten to kill another immediately or in the future, and by words or conduct placed the person threatened . . . in reasonable fear that the threat would be carried out. . . .” Clerk’s Papers (CP) at 59. To prove felony harassment, the State had to prove that Leming (1) threatened to kill Leah and (2) that she feared he would carry out the threat.

The State also charged that Leming committed second degree assault, alleging that “with intent to commit a felony, to wit: felony harassment, [Leming] did assault another person. . . .” CP at 58. To prove second degree assault, the State had to prove that Leming assaulted Leah by intending to place her in fear that he would carry out his threat to kill her.

In short, the State had to prove the same facts for both crimes, namely that Leming committed felony harassment. It relied on the same evidence to prove both—Leming’s threat to snap Leah’s neck and her fear that he would carry out the threat. Thus, under the same evidence test, the convictions were the same in fact and in law. *See, e.g. Freeman*, 153 Wn.2d at 777 (We do not consider the criminal elements in the abstract to determine whether each statute requires proof of a fact that the other one does not.).

We hold, therefore, that, as charged, these two convictions, felony harassment and second degree assault predicated on the same acts of felony harassment, subjected Leming to multiple punishments for the same offense and, therefore, violated his state and federal constitutional rights to be free from double jeopardy.⁸ *See In re Restraint of Orange*, 152 Wn.2d 795, 820, 100 P.3d

⁸ Accordingly, our analysis ends here, and we need not address legislative intent. Quoting from our Supreme Court, we further note, however,

As we have said, the prosecutor should not be denied the right to charge the separate offenses, for he may fail to persuade the jury that the greater offense was committed, while succeeding in proving the ancillary crimes. There is no

291 (2004) (double jeopardy is violated when “*the evidence required* to support a conviction upon one of the [charged crimes] would have been sufficient to warrant a conviction upon the other”) quoting *State v. Reiff*, 17 Wash. 664, 667, 45 P.318 (1896).

II. Merger

In a related argument, Leming contends that the merger doctrine precludes his convictions for both second degree assault and (a) assault in violation of a court order and (b) felony harassment.

The merger doctrine applies when the degree of one offense is raised by conduct that the Legislature has separately criminalized. *Freeman*, 153 Wn.2d at 772-73.

The merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (*e.g.*, first degree rape) the State must prove not only that a defendant committed that crime (*e.g.*, rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (*e.g.*, assault or kidnapping).

Freeman, 153 Wn.2d at 777-78 (quoting *State v. Vladovic*, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983)). Where the merger doctrine applies, we presume that the Legislature intended to punish both crimes by prescribing a single, greater sentence for the greater offense.

In *Freeman*, for example, our Supreme Court held that second degree assault merged with first degree robbery where, in order to prove first degree robbery, the State had to prove that the defendant committed assault in furtherance of that robbery. 153 Wn.2d at 778. Without the additional assaultive conduct, the defendant would have been guilty of only second degree

reason to deprive him of this opportunity.
State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

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robbery; with the assault, however, the convictions merged. *Freeman*, 153 Wn.2d at 778.

A. Second Degree Assault and Assault in Violation of a Court Order

We disagree with Leming that the merger doctrine precludes his convictions for both second degree assault and assault in violation of a court order.

In contrast with *Freeman, supra*, the State did not need to prove that Leming committed second degree assault in order to prove assault in violation of a court order. On the contrary, by statutory definition, in order to convict Leming of assault in violation of a court order, the State had to prove an assault that did not amount to first or second degree assault.

Moreover, the gravamen of assault in violation of a court order is the defendant's act of violating the order by approaching the victim, coupled with a lesser degree of assault, or conduct that creates a risk of, but does not amount to, a more serious assault. RCW 26.50.110(4).⁹

Here, Leming completed the charged crime by going to Leah's workplace in violation of the court order that prohibited him from contacting her and by pushing her and hitting her with the folded legal papers, which actions did not amount to first or second degree assault. RCW 26.50.110(4). Thus, Leming completed the assault in violation of a court order before he threatened to "snap [her] like a twig," the additional, harassing conduct that constituted the separate second degree assault count.

Accordingly, we hold that the merger doctrine does not apply to second degree assault and assault in violation of a court order as charged and proved here. *See State v. Louis*, 155

⁹ At the very least, the State needed to prove that Leming committed fourth degree assault against Leah. RCW 9A.36.041(1) provides: "A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another," in other words, an assault committed with a non-deadly weapon.

Wn.2d 563, 571, 120 P.3d 936 (2005) (the merger doctrine did not apply to convictions for simultaneous kidnapping and robbery because proof of kidnapping was not necessary in order to prove robbery).

B. Second Degree Assault and Felony Harassment

Having held that Leming's convictions for second degree assault and felony harassment violate the state and federal double jeopardy clauses, we do not separately address whether the merger doctrine applies to these two offenses.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

III. Sufficiency of Evidence

Leming next argues that (1) the evidence was insufficient to support his conviction for felony harassment; and (2) because there was insufficient evidence of felony harassment, the evidence was necessarily insufficient to support his conviction for second degree assault. This argument also fails.

A. Standard of Review

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are

equally reliable. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

The State must prove all elements of a crime beyond a reasonable doubt. *State v. Lively*, 130 Wn.2d 1, 11, 921 P.2d 1035 (1996).

B. Felony Harassment and Second Degree Assault

Although we vacate Leming's felony harassment conviction as violative of double jeopardy prohibitions, we nevertheless address the sufficiency of evidence to support this conviction because it is foundational to proving second degree assault.

As we have already noted, to prove felony harassment, the State had to prove beyond a reasonable doubt that Leming threatened to kill Leah and that she reasonably feared he would carry out that threat. RCW 9A.46.020. The State met that burden here. Leming entered the motel room angry. He grabbed Leah, shoved her against the wall of the bathroom, and then said, "I can snap you like a twig, you know I can do it, you know." RP at 67. Leah testified that (1) she was afraid because he could break her neck or her arm;¹⁰ (2) she was afraid of Leming

¹⁰ In addition, Beverly heard Leming threaten to kill Leah and her child. Leah, however, did not hear that comment. Thus, this particular threat could not have put Leah in reasonable fear that Leming would kill her; therefore, the basis for Leming's felony harassment charge had to have been his threat to "snap [her] like a twig."

because he had been violent in the past; and (3) she was so frightened of Leming that she stayed with a friend that night because she was afraid to stay alone in her house.

Taking the evidence in a light most favorable to the State, the evidence shows that Leming made a threatening statement to Leah, which she reasonably believed meant that he intended to snap her neck. And she reasonably believed that he would carry out the threat, which, of course, would have killed her. Thus, there was sufficient evidence to support Leming's conviction for felony harassment.

C. Second Degree Assault

In his Statement of Additional Grounds (SAG),¹¹ Leming argues that “there are no grounds to support the charge of assault in the second degree” because the court lacked sufficient evidence of felony harassment to support his second degree assault conviction. Having held that there was sufficient evidence to prove felony harassment, we also hold that there was sufficient evidence to support the second degree assault conviction.

IV. Effective Assistance of Counsel

Leming next argues that he received ineffective assistance when his trial counsel (1) failed to argue that his crimes were the same criminal conduct for offender score purposes and (2) failed to object to or to cross examine Beverly's testimony that she was inside the motel room. Having already decided the offender score issue in Leming's favor, *infra*, for reasons unrelated to effective assistance of counsel, we address only his remaining second ground.

A. Standard of Review

¹¹ RAP 10.10.

To show ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for counsel's deficient performance, the outcome would have differed. *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Because we give great judicial deference to counsel's performance, our analysis begins with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689-90, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). This presumption can be overcome where, for example, the attorney failed to properly investigate, determine appropriate defenses, or properly prepare for trial. *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981) (quoting *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978)).

We grant great deference to trial attorneys. See e.g., *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 742-43, 16 P.3d 1 (2001). Our Supreme Court has held, "[T]he law must afford the attorney a wide latitude and flexibility in his choice of trial psychology and tactics." *Pirtle*, 136 Wn.2d at 488 (quoting *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967)). We seek to prevent the defendant from using hindsight to second guess his trial attorney and effectively reverse his conviction. *Stenson*, 142 Wn.2d at 742-43. Leming fails to meet his burden here.

B. Failure to Object to Beverly Strom's Testimony

In his SAG, Leming argues that his trial counsel should have objected to Beverly's testimony that she entered the motel room. The motel surveillance tape showed that Beverly did not enter the room and instead, came to the door only a few seconds before Leming exited. When defense counsel asked Leming about Beverly's location, he responded that Beverly was never in the motel room. In thus eliciting Leming's testimony to provide a different version of events, defense counsel impugned Beverly's credibility. This defense strategy was helpful to Leming's defense.

Furthermore, although Leming's attorney did not object to Beverly's direct testimony, he did object to the State's calling her for a second rebuttal. Nonetheless, Leming's counsel cross-examined Beverly to create further doubt as to her credibility. This tactic was not unreasonable. Moreover, because we grant counsel wide latitude to develop strategy and we do not grant the appellant the benefit of hindsight, we do not find Leming's counsel's performance deficient.

In addition, Leming has failed to meet the second prong of the ineffective assistance of counsel test: He has failed to show prejudice resulting from his trial counsel's tactic. The record indicates that Leming could not show prejudice from his claim that counsel failed to cross examine Beverly because the record clearly illustrates that Beverly gave conflicting testimony about whether she had been in the motel room or just outside when Leming assaulted Leah. In short, had trial counsel not committed the deficiency that Leming asserts, the result would have been the same.

We hold, therefore, that Leming has failed to establish ineffective assistance of counsel with respect to cross examination of Beverly.

V. Photograph Evidence

Also in his SAG, Leming argues that the trial court should have admitted into evidence a photograph of Leah that police had taken after the altercation. Leming tried to introduce the photo during Leah's cross examination. The trial court preliminarily sustained the State's objection because Leming had not laid a proper foundation establishing that the photograph truly and accurately represented what it was intended to depict.

Nonetheless, the trial court stated that it would allow Leming to introduce the photo once he laid the proper foundation by asking Leah additional appropriate questions. But Leming did not follow up with voir dire of Leah to lay the necessary foundation. Thus, although the trial court excluded the photo at that time, it did not preclude Leming from offering it again. Instead, the court simply required Leming to follow the rules of evidence and to lay a foundation before the photo could come in. Such discretionary, proper evidentiary ruling by the trial court was not error.

VI. Offender Score

Leming argues that the trial court erred when it did not find that assault violating a court order, second degree assault, and felony harassment constituted the same criminal conduct for purposes of determining his offender score. The State concedes this error in part.

A. Same Criminal Conduct

RCW 9.94A.589, which governs sentencing for two current offenses, provides in pertinent part:

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of

the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. . . . “Same criminal conduct,” as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

RCW 9.94A.589(1)(a).

“Same criminal conduct” is a situation where there are “two or more crimes that (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim.” *State v. Saunders*, 120 Wn. App. 800, 824, 86 P.3d 232 (2004) (quoting *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994)). We construe these exceptions narrowly and apply them only where all three elements are met. *Saunders*, 120 Wn. App. at 824. To determine whether the defendant had the same criminal intent in committing both crimes, the court looks to whether the defendant’s objective intent changed from one crime to the next. *Saunders*, 120 Wn. App. at 824. We find a single intent when (1) one crime is in furtherance of another or (2) when numerous offenses are committed as part of a scheme or plan, with no substantial change to the criminal objective. *State v. Flake*, 76 Wn. App. 174, 180-81, 883 P.2d 341 (1994).

The trial court has discretion in determining whether different crimes involve the same criminal conduct. We will not disturb the trial court’s decision unless there was a clear abuse of discretion or a misapplication of the law. *Flake*, 76 Wn. App. at 180. We find no such abuse or mistake here.

B. Second Degree Assault and Assault in Violation of No-Contact Order

Having vacated the felony harassment conviction on double jeopardy grounds, the two assault convictions remain.

The State concedes that the two assaults occurred at the same place and time, that they involved the same victim, and that “the defendant’s intent, viewed objectively, for the two assaults [wa]s indistinguishable. . . .” Br. of Respondent at 9. Leming objectively intended to cause fear and harm to Leah when he grabbed her, pushed her, hit her with the papers, and threatened her. His intent remained constant throughout the entire episode. We accept the State’s concession that the two assaults are the same criminal conduct for offender score purposes.

The State further acknowledges that even if all three convictions were considered to be the same criminal conduct for offender score purposes, Leming’s offender score of 9+ would be reduced by two points to a score of 8, with a somewhat lower standard range sentence for the second degree assault. We also accept the State’s recalculation of Leming’s offender score. Therefore, we must remand for resentencing.

CONCLUSION

We vacate Leming’s felony harassment conviction as violative of double jeopardy. We affirm his convictions for second degree assault and assault in violation of a court order. And we remand for resentencing.

Hunt, J.

We concur:

Quinn-Brintnall, C.J.

Van Deren, J.